

Berrien To Play Forceful Role As EEOC Head: Experts

By Ryan Davis

Law360, New York (April 07, 2010) -- Jacqueline Berrien, who was sworn in Wednesday as the new chairwoman of the U.S. Equal Employment Opportunity Commission, will likely usher in an era of more aggressive enforcement of employment laws, with a particular focus on systemic discrimination issues, experts said.

Berrien, the former associate director-counsel of the NAACP Legal Defense and Educational Fund, was given a recess appointment by President Barack Obama last month. With her swearing in, she became the first permanent chair of the agency since Naomi Earp departed at the end of the George W. Bush administration.

Chai Feldblum was also sworn in as an EEOC commissioner Wednesday and P. David Lopez will be sworn in as the agency's general counsel Thursday. When Victoria Lipnic is sworn in as a commissioner later this month, the EEOC will again have a full complement of five commissioners. Like Berrien, Feldblum, Lopez and Lipnic were given recess appointments by Obama.

Berrien's background as a litigator makes her atypical among recent EEOC chairs and will shape the direction of the agency, attorneys said.

Framroze Virjee, chair of the labor and employment practice at O'Melveny & Myers LLP, said that under Berrien, the agency would play a much more active role in working to root out discrimination than it did during the Bush administration, when he said there was a "lack of earnest belief" in the EEOC's mission.

Berrien will be out to prove that hiring her will make a difference in combating discrimination, Virjee said, so the agency is likely to file more cases and take on high-profile employers, including Fortune 500 companies, on glass ceiling and boardroom issues and disability cases.

High-tech and financial service companies may be a particular focus, he said, and the EEOC will likely seek more complex consent decrees with a national scope in the cases it brings. The EEOC is also likely to mount an enhanced recruitment effort to increase staff levels, he said.

Dennis Duffy, chair of the labor and employment practice at Baker Botts LLP, said Berrien's past experience should lead her to take a more active role in litigation and give her a natural feel for how the agency can most effectively use its litigation resources, he said.

"Given her past jobs, it's a safe bet that systemic discrimination issues will be a focus," he said.

Berrien has expressed strong support of an EEOC program, established during the previous administration, to combat systemic discrimination in the workplace by bringing more large class-type cases and educating employers on preventing discrimination.

That program has quietly made progress in the past few years toward emphasizing more systemic cases and moving the agency away from being purely a complaint-processing agency, said Michael Selmi, a professor at George Washington University Law School.

In the past few years, the EEOC has been much more active in enforcing discrimination laws than the U.S. Department of Justice's Civil Rights Division and could become even more so under new leadership, he said.

"I think Jackie is a good person to do that," said Selmi, who worked with Berrien several years ago on the Lawyers' Committee for Civil Rights.

Leslie E. Silverman, a Proskauer Rose LLP partner and former vice chair of the EEOC, said Berrien was likely to concentrate her initial efforts on management issues, including looking at ways to improve its relationship with Congress and address a backlog of tens of thousands of unresolved cases.

Berrien will also have the task of naming the new head of the EEOC's Office of Legal Counsel, a political job that does not require confirmation. The office has the responsibility of writing regulations and serves as the agency's principal adviser on policy matters, so it plays an important, though often overlooked, role at the EEOC, Silverman said.

The office will be particularly important since the EEOC is working to finalize the new Americans with Disabilities Act Amendments Act and Genetic Information Nondiscrimination Act regulations and has recently issued a new notice of proposed rulemaking addressing the definition of "reasonable factors other than age" under the Age Discrimination in Employment Act, Silverman said.

Ron Cooper, a Steptoe & Johnson LLP partner who served as the EEOC's general counsel until January 2009, said Berrien's litigation experience should give her an appreciation of the role of the general counsel's office and would lead her to help the office get the resources it needs.

During her confirmation hearing, Berrien said she hoped to work collaboratively with other federal agencies that enforce employment laws, which Cooper said should give some measure of comfort to employers who have raised concerns about the multiple demands different agencies have placed upon them.

Selmi said he was somewhat concerned that putting Berrien in place with a recess appointment ran the risk of making her and the agency more cautious. He said he hoped she would eventually be confirmed formally so there wouldn't be another long stretch of time when the agency lacks a permanent chair.